Miharja Development Sdn Bhd & Ors v Tan Sri Datuk Loy Hean Heong & Ors and another application

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) PETITION NOS D3-28-83-94 AND D3-28-93-94
VC GEORGE J
6 SEPTEMBER 1994

Companies and Corporations *— Winding up — Petition under s 217 — Whether ordinary resolution necessary — Whether directors may petition without obtaining shareholders' sanction — Companies Act 1965 ss 217 & 254*

Companies and Corporations *— Winding up — Petition under s 217 — Persons entitled to petition — Whether shareholders whose shares are pledged as security and registered in pledgee or nominee's name entitled to petition — Whether petition should be refused if there will be no assets — Companies Act 1965 ss 217(1)(c) & 221(1)*

Civil Procedure *— Striking out — Winding-up petition — Whether complaints of petitioners baseless or obviously unsustainable*

The petitioners had an agreement to develop certain land and entrusted the project to MBf Property Services Sdn Bhd ('MBf Property') (the seventh respondent) with financing to be provided by MBf Finance Bhd (the third respondent). A loan agreement was entered into with MBf Finance Bhd and security for the loan included a debenture and deposit of shares. The shares were registered in the name of a nominee company of MBf Finance Bhd, ie MBf Nominees Sdn Bhd, and were held as security. The project was substantially completed when the petitioners' directors realized that it had suffered losses of RM51m and was projected to lose RM21m upon completion. As the project was the only business of the two petitioners and it was apparently impossible for them to carry on business profitably based on information given by MBf Property, the directors decided to petition for winding up under s 217 of the Companies Act 1965 ('the Act').

The petitioners alleged that as the shares were registered in the name of MBf Nominees, the members in whose names the shares were registered prior to that ('the alleged real shareholders') could not hold a general meeting to sanction the petitions for winding up. The petitioners' directors contended that: (i) the agreements with MBf Property and the powers of attorney granted to it had the effect of MBf Property's directors replacing the petitioners' directors; and (ii) MBf Property and its directors were deemed to be the petitioners' directors but had acted in the interests of the MBf Group of Companies to the detriment of the petitioners and their members. The respondents, however, contended that the petitioners could not petition the court to wind themselves up without the consent of the registered shareholder, ie MBf Nominees. The respondents applied to strike out the petitions on the grounds that: (i) the alleged real

shareholders had lost the right to petition as contributories by virtue of MBf Nominees being the registered shareholder of all the petitioners' issued shares; and (ii) they were an abuse of the process of court.

Held, dismissing the respondents' applications to strike out the petitions:

(1) There is no provision in s 217 of the Act requiring an ordinary resolution as a condition precedent to a company taking out a s 217 petition, unlike s 254. The omission must have been a deliberate one and the effect of and practice in respect of s 217(1)(a) is and should be that the directors of a company may petition the court to wind up the company without first having to obtain the sanction of the shareholders, particularly where it is not possible to obtain the views of the real shareholders at an EGM because the shares are held as security by a financial institution in whose name they are registered.

(2) The persons entitled to bring a petition under s 217(1)(c) include contributories and to the list should be added shareholders whose shares are pledged or held as security, upon which the charge has not been foreclosed, even though they have been registered in the name of the pledgee or its nominee. It was the technicality of the shares being registered in the name of MBf Nominees that prevented the alleged real shareholders from exercising their rights as shareholders. Thus, they should be deemed to be the shareholders and were prima facie entitled to petition to wind up under s 217(1)(c) read with the definition of 'contributory'. Under s 221(1) of the Act, the court shall not refuse to make a winding-up order on the ground only, in the case of a petition by a contributory, that there will be no assets.

(3) The petitions were not an abuse of process as the evidence showed that the complaints of the petitioners were not baseless or obviously unsustainable. On the contrary, there should be an independent full and critical investigation of the petitioners' affairs and of the project. Leave for a stay of the orders pending appeal was refused.

[Bahasa Malaysia summary

Pempetisyen telah mengikat suatu perjanjian untuk membangunkan tanah tertentu dan telah mengamanahkan projek itu kepada MBf Property Services Sdn Bhd ('MBf Property') (responden ketujuh) dengan kewangan disediakan oleh MBf Finance Bhd (responden ketiga). Suatu perjanjian pinjaman telah diikat dengan MBf Finance Bhd dan cagaran untuk pinjaman itu termasuk satu debentur dan deposit saham. Saham itu telah didaftarkan di dalam nama suatu syarikat penerima namaan MBf Finance Bhd, iaitu MBf Nominees Sdn Bhd, dan dipegang sebagai cagaran. Sebahagian besar daripada projek itu telah disiapkan apabila pengarah pempetisyen sedar bahawa

projek itu telah mengalami kerugian sebanyak RM51 juta dan dijangka mengalami kerugian sebanyak RM21 juta apabila siap. Oleh kerana projek itu merupakan perniagaan tunggal dua pempetisyen itu dan mereka kononnya tidak mungkin meneruskan perniagaan secara menguntungkan berdasarkan maklumat yang diberikan oleh MBf Property, pengarah pempetisyen telah membuat keputusan supaya mempetisyen untuk penggulungan di bawah s 217 Akta Syarikat 1965 ('Akta itu').

Pempetisyen mengatakan bahawa oleh kerana saham itu telah didaftarkan di dalam nama MBf Nominees, ahli yang telah didaftarkan sebagai pemegang saham sebelum itu ('pemegang saham sebenar yang dikatakan itu') tidak boleh mengadakan suatu mesyuarat am untuk menyetujui petisyen penggulungan itu. Pengarah pempetisyen menegaskan bahawa: (i) perjanjian dengan MBf Property dan surat kuasa wakil yang diberikan kepadanya berkesan untuk menggantikan pengarah pempetisyen dengan pengarah MBf Property; dan (ii) MBf Property dan pengarahnya dianggap sebagai pengarah pempetisyen tetapi telah bertindak mengikut kepentingan Kumpulan Syarikat MBf dengan menjejaskan pempetisyen dan ahli-ahli mereka. Bagaimanapun, responden menegaskan bahawa pempetisyen tidak boleh mempetisyen mahkamah untuk menggulungkan diri mereka sendiri tanpa persetujuan pemegang saham berdaftar, iaitu MBf Nominees. Responden telah memohon untuk membatalkan petisyen tersebut atas dasar bahawa: (i) pemegang saham sebenar yang dikatakan itu telah hilang hak mereka untuk mempetisyen sebagai penyumbang oleh kerana MBf Nominees adalah pemegang saham berdaftar kesemua saham terbitan pempetisyen; dan (ii) petisyen itu adalah suatu penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan responden untuk membatalkan petisyen itu:

(1) Tidak ada peruntukan di dalam s 217 Akta itu yang memerlukan suatu ketetapan biasa sebagai suatu syarat duluan sebelum sesuatu syarikat itu boleh membawa suatu petisyen di bawah s 217, tidak seperti s 254. Peninggalan itu semestinya dilakukan dengan sengaja dan kesan serta amalan berkaitan dengan s 217(1)(a) adalah dan seharusnya menjadi bahawa pengarah sesuatu syarikat boleh mempetisyen mahkamah untuk penggulungan syarikat itu tanpa mendapatkan persetujuan pemegang sahamnya terlebih dahulu, terutamanya di mana ianya mustahil untuk mendapatkan pandangan pemegang saham sebenar di suatu mesyuarat agung luar biasa kerana saham itu dipegang sebagai cagaran oleh sebuah institusi kewangan yang merupakan pemegang berdaftar.

(2) Orang yang berhak membawa suatu petisyen di bawah s 217(1)(c) termasuk penyumbang and kepada senarai itu juga seharusnya ditambahkan pemegang yang saham mereka telah disandar atau dipegang sebagai cagaran, di atas mana gadaiannya belum ditutup, walaupun saham itu telah didaftarkan di dalam nama pemegang

sandaran itu atau namaannya. Apa yang menghalang pemegang saham sebenar yang dikatakan itu daripada menggunakan hak mereka sebagai pemegang saham ialah isu teknik bahawa saham itu telah didaftarkan di dalam nama MBf Nominees. Oleh yang demikian, mereka sepatutnya dianggap sebagai pemegang saham dan prima facie berhak untuk mempetisyen untuk penggulungan di bawah s 217(1)(c) dibaca dengan definisi 'penyumbang'. Di bawah s 221(1) Akta itu, mahkamah tidak akan menolak suatu permohonan untuk perintah penggulungan hanya atas dasar, di dalam kes di mana petisyen itu dibawa oleh seorang penyumbang, bahawa tidak ada aset lagi.

(3) Petisyen-petisyen tersebut tidak merupakan suatu penyalahgunaan proses mahkamah kerana keterangan menunjukkan bahawa aduan pempetisyen bukanlah tanpa alasan dan jelas tidak boleh dipertahankan. Sebaliknya, suatu penyiasatan bebas yang lengkap dan kritis ke dalam hal pempetisyen dan project itu seharusnya diadakan. Kebenaran untuk penggantungan perintah semasa menunggu rayuan ditolak.]

Notes

For cases on winding-up petitions, see 3 *Mallal's Digest* (4th Ed, Reissue) paras 518–537; [1993] Mallal's Digest 389.

For a case on striking out a winding-up petition, see 2 *Mallal's Digest* (4th Ed, Reissue) para 3171.

Cases referred to

Ah Yee Contractors (Pte) Ltd, Re [1987] 2 MLJ 590 (not folld)

Birmacley Products Pty Ltd, Re [1942] ALR 276 (not folld)

Campbell v Rofe (1932) 48 CLR 258 (refd)

Emmadart Ltd, Re [1979] Ch 540; [1979] 1 All ER 599; [1979] 2 WLR 868 (not folld)

Galway & Salthill Tramway Co, Re [1918] 1 IR 62 (not folld)

Inkerman Grazing Pty Ltd, Re (1972) 1 ACLR 102 (folld)

JN2 Ltd, Re [1977] 3 All ER 1104; [1978] 1 WLR 183 (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789 (not folld)

Othery Construction Ltd, Re [1966] 1 All ER 145; [1966] 1 WLR 69 (distd)

Rica Gold Washing Co, Re (1879) 11 Ch D 36 (distd)

Smith v Duke of Manchester (1883) 24 Ch D 611 (not folld)

Standard Bank of Australia Ltd, Re (1898) 24 VLR 304; 4 ALR 287 (not folld)

Legislation referred to

Companies Act 1965 ss 217(1)(a), (c), 217(2), 218(1)(f), (i), 254(1)(b), 303(3)

Companies Act s 257 [Sing]

Insolvency Act 1986 [GB]

A *G Sri Ram* (*Joseph Yeo & Edmund Kam* with him) (*Joseph Yeo*) for the petitioners.

KS Narayanan (*K Mogan & Heng Fook Seng* with him) (*Heng & Mogan*) for the first, second, seventh to tenth respondents.

KS Narayanan (*Ranjit Singh & Evelyn Khoo* with him) (*Cheang & Ariff*) for the third respondent.

B *KS Narayanan* (*Tan Ching Toh & Patrick Koo* with him) (*Chong Chai & Co*) for the fourth to sixth respondents.

Cur Adv Vult

C **VC George J**: The following various applications in these two related matters were with the agreement of counsel disposed of together, with counsel referring for the facts and for the position taken by the parties, to the affidavits filed in the Petition No 28–93–94 to be applied mutatis mutandis in respect of Petition No 28–83–94 and to each of the said D applications being encls 4, 10 and 13 in each petition and encls 42, 20 and 26 in Petition No 28–83–94 and encls 50, 23 and 17 in Petition No 28–93–94.

Miharja Development Sdn Bhd ('Miharja') was at all relevant times the registered proprietors of certain lands in respect of which they had an agreement with Uncang Emas Sdn Bhd ('Uncang') for Uncang to develop E the lands. These two companies in effect entrusted the execution of the project to one of the MBf Group of Companies called MBf Property Services Sdn Bhd (the seventh respondent in each of the petitions), the development to be carried out with financing provided by another MBf company called MBf Finance Bhd (the third respondent in each of the F petitions). A loan agreement was entered into with MBf Finance Bhd and security for the repayment of the intended loan and for the due adherence to the terms of the loan agreement was provided which included a debenture and a deposit of shares. The holders of all the issued shares of the two companies (in the case of Uncang Emas it was the second and third petitioners in Petition No 28–93–94) had pledged them to the lender with G whom they were deposited together with duly executed blank memoranda of transfer. Although the lender had the shares registered in the name of its nominee company, MBf Nominees Sdn Bhd, it was common ground that the shares were continued to be held under the terms of the pledge as security as aforesaid.

H The development of the project was to be undertaken in phases. The first two phases were completed or substantially completed, and substantial works in respect of the earth works and some of the foundation works in respect of Phase III had been completed when the directors of Uncang (and of Miharja) apparently came to realize the extent of the loss that the I project had suffered — some RM51m, and that completion of the whole project would still result in a substantial loss. As apparently the project was the only business of the two companies and because it was, in the opinion of the directors of the companies, based on information given by the seventh respondent, that it was impossible for each of the companies to

carry on its business with profits, the directors decided that justice and equity required that each of the two companies should be wound up.

The directors of the two companies also contend that the combined effect of the various agreements they had entered into with MBf Property Services Sdn Bhd and the powers of attorney they had granted pursuant to or in relation to those agreements had the effect of MBf Property Services Sdn Bhd, its directors and officers replacing, as it were, the directors of the petitioner companies in respect of the management and affairs of the petitioner companies. The directors of the two companies further contend that MBf Property Services Sdn Bhd and its directors and officers are, in the circumstances, deemed to be directors of the two companies and that these deemed directors have been acting in the interests of the MBf Group of Companies to the detriment and prejudice of the two petitioner companies and its members.

The shares of the companies being registered in the name of the nominee company, it was not possible for the members in whose names the shares were registered prior to the registration of the nominee company as shareholders (those members are hereinafter referred to as 'the alleged real shareholders') to hold or take part in a general meeting of either of the companies. The directors named as such in the records of the companies, however, took it upon themselves without first obtaining the sanction of the nominee shareholders to decide at a board meeting to have each of the companies petition the court to wind up the company.

The alleged real shareholders claim to be contributories and, as such, purport to join the company as joint petitioners. The petitions are purported to be brought pursuant to s 217(1)(a) and (c) on the basis of s 218(1)(f) and (i) of the Companies Act 1965.

MBf Property Services Sdn Bhd, MBf Finance Bhd and various other MBf companies who may be effected by these petitions and various directors of those companies, including Tan Sri Datuk Loy Hean Heong, have been made respondents to these petitions.

The respondents contend that neither Uncang nor Miharja may petition the court to wind up themselves without the consent of the registered shareholders, the nominee company, which in fact opposes the petitions. They also contend that the petitions should be struck off in limine on the ground that the alleged real shareholders are not entitled to petition as contributories because they have lost that right by virtue of the nominee company being the registered shareholders of all the issued shares of each of the companies and on the further ground that these petitions and each of them are an abuse of the process.

I will first deal with the locus standi of a company to petition to wind up itself at the instance of the board of directors without the sanction of the shareholders.

In the State of Victoria, Australia, the courts have construed the article in the articles of association of a company in pari materia with

art 116 in the articles of association of each of the petitioner companies that provides that:

> The business of the company shall be managed by directors who may exercise all such powers of the company as are not by the Act or by these presents required to be exercised by the company in general meeting, subject nevertheless to any regulations of these presents, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions as may be prescribed by special resolution of the company, but no regulation so made by the company shall invalidate any prior act of the directors which would have been valid if such regulation had not been made. The general powers given by this Article shall not be limited or restricted by any special authority or power given to the directors by any other Article provided that any sale of the company's main undertaking shall be subject to ratification by the members in general meeting.

as being limited for the purpose of conducting the business of the company and not for the purpose of destroying the company. They take the view that the board of directors have no power to present a petition to wind up the company without the support of the shareholders — *Re Standard Bank of Australia Ltd* (1898) 24 VLR 304; 4 ALR 287 and *Re Birmacley Products Pty Ltd* [1942] ALR 276. The Irish courts hold the same view — *Re Galway Salthill Tramways Co* [1918] 1 IR 62.

Although the old English case, *Smith v Duke of Manchester* (1883) 24 Ch D 611, also seemed to take a similar view, it would seem that up to the end of the 1979, it was the generally accepted English practice to recognize that the board of directors were entitled to present a petition to wind up the company without first obtaining the sanction of the shareholders to do so — see *Buckley on the Companies Act* (13th Ed, 1959) at p 462 and 1 *Palmer's Company Law* (22nd Ed, 1976) at p 691.

This was the position until the end of 1979, when Brightman J delivered the judgment in *Re Emmadart Ltd* [1979] 1 Ch 540 at p 547; [1979] 1 All ER 599 at p 605; [1979] 2 WLR 868 at p 874 where he said:

> The practice which seems to have grown up, under which a board of director of an insolvent company presents a petition in the name of the company where this seems to the board to be a sensible course, but without reference to the shareholder, is in my opinion wrong and ought no longer to be pursued ... What is stated in *Buckley* to be the law according to Irish authority is in my view equally the law in this country.

In 1986, the legislature intervened and the English Insolvency Act 1986 specifically provided for the directors to present the petition without reference to the shareholders. In New Zealand also, there are statutory provisions to the like effect.

This issue of the locus standi in the context of the board of directors has apparently never come up before the Malaysian or Singapore courts and it has now fallen on me to lay down what the Malaysian practice should be.

I agree with Encik Sri Ram, leading for the petitioners, that *Emmadart* does not lay down any universal principle of law but only reversed a

practice. In this context, I found myself persuaded by the reference and relevance of s 303(3) of the Companies Act 1965 and to the distinction between ss 217(1)(a) and 254(1)(b) of that Act which for convenience are reproduced here:

> 217(1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the petition of —
>
> (a) the company; ...
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> 254(1) A company may be wound up voluntarily —
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> ...
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> (b) if the company so resolves by special resolution.
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> 303(3) If in the course of the winding up of a company or in any proceedings against a company it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time, of the company being able to pay the debt, the officer shall be guilty of an offence against this Act.

My attention was particularly drawn to *Palmer's Company Law* (24th Ed, 1982) at p 1374:

> Petitions by the company are not very common; for if a company desires to wind up, it has only to pass a special, or an extraordinary, resolution for voluntary winding up (Insolvency Act s 84). However, if the directors find the company to be insolvent owing to matters which ought to be investigated by the court, it may well be that their proper course is to apply at once on behalf of the company to the court by petition for a compulsory order.

If the shareholders pass a special resolution, the comparatively simple and cheaper procedure for voluntary winding up of the company provided by s 254 can be invoked. If there is such a special resolution, there would appear to be no point in invoking the s 217 procedure for winding up by the court.

There is, I think, significance in the fact that the legislature has specifically provided in s 254 for a special resolution of the shareholders, and omitted to provide, as a condition precedent even, for an ordinary resolution with reference to s 217(1)(a). If it had been the intention of the legislature that one of the conditions precedent to the company taking out a s 217 petition is that the sanction of the shareholders be obtained, it would have provided for that and could have done so conveniently in s 217(2) where a number of qualifications to the provisions in s 217(1) are made. The omission must have been a deliberate and considered omission.

I also agree that in the face of s 303(3), a fetter on the directors is far from desirable. In the New South Wales case of *Re Inkerman Grazing Pty Ltd* (1972) 1 ACLR 102 at p 106, Street J said:

> Not only is there the authority of a course of practice recognized and given effect by judges in this State and, practical justifications and, indeed, necessities, for recognizing this power in directors. As is pointed out in Palmer's textbook, there can well be occasions where the proper course is

> for directors of a company to apply at once for a winding up by the court. It is often only by a procedure of this nature that a company with widespread financial interests affecting a great many actual and prospective creditors, let alone shareholders, can move to protect its creditors and shareholders in the event of a sudden financial crisis developing which leaves it in a position of insolvency.

Unlike Brightman J in *Emmadart*, who had to descend into the arena himself as it were because only one party to the matter before him was represented by counsel, I have here had the benefit of the learned and well researched submissions of the opposing teams of lawyers each led by an eminent leader of the commercial Bar in the persons of Encik G Sri Ram and Encik KS Narayanan who have, between them, covered every possible aspect of the issue. Inter alia, I take the point that was made that Brightman J does not appear to have been referred to the New South Wales practice and the merits of the practice as set out in the various judgments of the courts there. He was also not referred to the Privy Council's opinion expressed in 1932 in the Australian case, *Campbell v Rofe* (1932) 48 CLR 258, PC. It had been contended in that case that either art 10 of the company in question or art 117 (in pari materia with art 116 in the Articles of the two companies here) had provided the directors with the power to take the action that they had taken in respect of which their Lordships of the Privy Council, having expressed the view that art 10 provided the power exercised by the directors, went on to say at p 265:

> In this view, art 117, which only purports to confer additional powers, does not include the powers conferred by art 10; but, if their Lordships had taken a different view as to art 10, they would have been prepared to hold that art 117 clearly delegated to the directors power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed, ...

I would echo *Inkerman* and say that it is not desirable that there be a fetter on the directors. While the directors may not cause the company to voluntarily be wound up without a special resolution to do so by the members because there is express provision to that effect in s 254, they should not be prevented, if they feel that that is the sensible course to take, to move the court for a winding-up order without first obtaining the sanction of the shareholders to do so. I would apply the wide (rather than narrow) construction to art 116 recommended by the Privy Council in *Campbell v Rofe*. I would respectfully share the opinion of the English legislature manifested in the restoration of the English pre-1979 practice and of the New Zealand legislature in sanctioning a similar practice — I would and do lay down that the effect of and the practice in respect of s 217(1)(a) is and should be that the directors of a company may petition the court to wind up the company without having to first obtain the sanction of the shareholders. I have particularly in mind that there could be situations where expediency calls for urgent steps to be taken or where as is the case here, it is not possible to obtain the views of the real shareholders at an EGM because the shares are held as security by a

financial institution in whose name they are registered and because of that it appears that it is not possible to obtain the sanction of the shareholders because of the doubt of the status of the alleged real shareholders vis-à-vis the shares. It is not difficult to think of other situations obtaining where the directors think it desirable that the company be wound up but the shareholders cannot or cannot expeditiously be summoned for an EGM.

The next issue for decision is whether in any event the second and third petitioners in Petition No 28–93–94 and the second to ninth petitioners in Petition No 28–83–94, who purport to petition the company as contributories, can be regarded, in the context, as contributories.

They had deposited their shares with the lender as security for the loans. The shares are held by the lender's nominee company who have had the shares registered in their name in their capacity as a nominee company. It has not been suggested that they hold the shares otherwise. As their name suggests they only hold the shares nominally; they hold them on trust for the real shareholders. While a company need not, shall not, look behind the share certificate, that is not to say that in fact shares cannot be held in trust by one person on behalf of a beneficiary.

Now, for the respondents, it has been submitted with some force in countering the contentions by the plaintiffs that the directors of the seventh respondent should be regarded as deemed directors of the company, that that cannot be and is not the position, inter alia, because all that the respondents were and are concerned with is managing the project, albeit the only project of the companies. They insist that they are not managing either of the companies.

It was submitted that there is nothing in the documents and on the facts that raises the inference of a joint venture or partnership or anything of that like nature.

In *Mcpherson* (3rd Ed) at p 111, it is stated that registration is a prerequisite to membership and the right of a contributory to apply for a winding-up order, but that there are exceptions to the rule, eg executors of the estate of a deceased shareholder. Our s 217(1)(c) provides that there can be a petition by:

> ... a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;

Re JN2 Ltd [1977] 3 All ER 1104; [1978] 1 WLR 183 added to the list an allottee who has a right to be a shareholder.

I think that it is consistent with the rationale behind s 217(1)(c) and *Re JN2 Ltd* that to the list should be added shareholders whose shares are pledged or are held as security and the charge on the shares has not been foreclosed, even though the shares have been registered in the name of the pledgee or its nominee. It is the technicality of the shares being registered in the name of the pledgee or its nominees that purports to prevent the real shareholders from exercising their rights as shareholders.

A And so it is seen that on the one hand, the respondents contend that their only interest in the company is in the project. They insist that they have no other interest or involvement with the companies. Even though all the issued shares are registered in the nominee company, they certainly are not holding out that they control the companies. In fact, they deny any such role. On the other hand, they say that they hold the shares of the B company to the exclusion of the rights of the real owners of the shares. That is blowing hot and cold. I think that the respondents are estopped from denying that the second and third petitioners are the owners of the shares now held by the MBf nominee company. They should be deemed to be the shareholders and as such are prima facie entitled, as was, inter C alia, the allottee in *Re JN2 Ltd* to petition to wind up under s 217(1)(c) read with the definition of 'contributory'. That the company should not recognize that shares are held in trust is, in the context, neither here nor there. The company is not being asked to recognize the trusteeship. It is the respondents and the court that are being asked to recognize the true status of the second and third petitioners vis-à-vis the shares, that they are D the real shareholders.

As to what was referred to as the insolvency rule vis-à-vis a petition by contributories, ie that the court will not entertain a petition by a contributory if the company appears to be insolvent, s 221(1) of our Act (and s 257 of the Singapore Act) provides that the court shall not refuse to E make a winding-up order on the ground only, in the case of a petition by a contributory, that there will be no assets.

For the respondents great reliance was placed on the English cases, *Re Rica Gold Washing Co* (1879) 11 Ch D 36 and *Re Othery Construction Ltd* [1966] 1 All ER 145; [1966] 1 WLR 69, where the insolvency rule was F applied. At the time these two cases were disposed of (in 1879 and 1966, respectively) there was no provision in England similar to the last limb of our s 221. It was only in 1980 that the amendment 2A which amounts to a similar provision to our last limb, was added on to the English section dealing with the power of the court in winding-up matters. The respondents placed even greater reliance on the Malaysian case, *Kumagai Gumi Co Ltd* G *v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789 and on the Singapore case, *Re Ah Yee Contractors (Pte) Ltd* [1987] 2 MLJ 590, that followed those two English judgments. A perusal of those judgments suggests that the said ss 221(1) and 257 were not brought to the attention of either of the judges. Applying that provision in s 221(1), that there will be no assets does not H per se provide a ground for the refusal of the winding-up order sought.

Accordingly, with respect, I have to and hold that the challenge to the locus standi of the contributory fails.

I now deal with the abuse of the process point. Shortly stated, the contention is that the petitions have been brought not for the protection of I the shareholders and the creditors, but for a collateral purpose to bring pressure on the respondents to bring a resolution of certain claims which one Dato' Kam Woon Wah has against the Loy faction. The basis of the role of Dato' Kam in all this is not clear but for the purposes of this

judgment I will assume that he has at least as much of a measure of control over Uncang and Miharja and the petitioners in both the petitions as Tan Sri Loy has on the respondents in both the petitions. That appears to be suggested, at least in reading between the lines, is that in reality, Kam and Loy are the main players, puppet masters manipulating the strings behind the scene. Neither of them have affirmed any of the affidavits used in these proceedings but it would appear that it is they who call the shots.

For the respondents, it is contended that the grievances that the petitioners have call for an action in contract in the ordinary courts. The relationship is contractual and if there have been breaches of it causing damage to the petitioners, they should move the civil courts and not misuse the process of the companies court. The petitioners counter this by setting out in affidavits, albeit well after the petitions had been filed, the petitioners and Dato' Kam's version (expressed through the petitioner, Hoong) of how Uncang and Miharja came to be as involved as they are with the MBf Group of Companies.

It is in effect contended that it was all a Loy scheme, using Dato' Kam as a front man. That is why, it is further contended, there was the option for Tan Sri Loy to take over the two companies and to take over certain shares that Dato' Kam had in the third respondent company and that when the option expired, there was the sale and purchase agreement to the like effect as the option.

The court cannot overlook the fact that there had in fact been the option which appears to have been replaced by the sale and purchase agreement on the very day that the option expired. To suggest that that was a coincidence is asking for too much and Encik Narayanan has certainly not suggested that. In the light of the existence of that option and that sale and purchase agreement which included the Kam Woon Wah shares in the third respondent, the court cannot reject in limine the contention by the second and third petitioners that they had allowed the respondent to run the project as they pleased because the intention was that under the leadership of Tan Sri Loy, the two companies and the project were to be taken over by the respondents or by Tan Sri Loy himself. I cannot at this stage, on the evidence before me, hold that it is far-fetched for the second and third petitioners to expect the court to accept that it was only after they had realized that the Loy faction were no longer interested in the two companies that they were forced to and had changed their posture vis-à-vis the companies. They in effect say that there was no doubt the monthly progress reports but it is contended that that was by way of mere lip service as neither the directors nor shareholders or Kam Woon Wah were really concerned with what was going on because it was in the contemplation of the parties that the Loy faction or Loy himself would be taking over the two companies and the project lock, stock and barrel.

In support of their contention that the respondents ran the project as if it was that of a subsidiary of the MBf Group, the petitioners contend that the awarding of contracts to various companies of the Group was made through pseudo-tender exercises.

A The respondents counter this serious complaint by contending that it was independent consultants who had awarded the tenders. However, the letters written by the so-called independent consultants in respect of the tender exercise does suggest that the decision in respect of the tenders were taken not by them but by the seventh respondents.

B The awards were, on the face of those letters, made by the consultants not as their decisions but as instructed by the seventh respondents. On the evidence before the court, it cannot at this stage be held as baseless the complaint that the tender exercises were contrived.

I need only now refer to one other aspect of the matter, to the C projections showing a projected loss of RM21m. The projection was by the managers of the project, MBf Property Services Sdn Bhd. The scenario as presented by Hoong, the second petitioner in Petition No 28–93–94, is that when his side realized that Tan Sri Loy was after all not going to take over Uncang and Miharja and the project, he wrote his letter of 6 November 1993, stating therein, inter alia, 'Since the sale and purchase agreement D had not been carried out by the purchasers, we are therefore compelled to resume our responsibilities as directors of the company under the law' and asked for the current financial position 'because we are very disturbed by market rumours that the above project might have incurred substantial losses'. Hoong asked for the latest position and forecast.

E MBf Property Services Sdn Bhd's reply to this was dated 7 December 1993, to which was enclosed the financial position with a forecast of what the position would be after the completion of Phase III. It showed that the project had taken a loss of some RM21m and on completion of Phase III, the loss would be reduced but that there would be a loss of some RM21m.

F It was only after the petition was filed stating therein, inter alia, that it was forecast that there would be such a loss that the respondents disclosed a valuation by the valuers, Khong & Jaafar, that predicted that Phase III would result in the project making profit. What the effect of the Khong & Jaffar valuation, which it would seem the respondents had with them when they provided the petitioner with the said projection, is obviously G something that has to be given due consideration. Why it was not disclosed to the petitioner earlier, particularly when it shows that a profit could be made, has not been explained. In any event, there is the valuation that the petitioners have procured from another valuer which forecasts that completion and sale proceeds of Phase III would not redeem the project H and that it would take a substantial loss. It is not for the court at this stage at the threshold of the petition, to decide which of the valuations (if any) should be accepted. But there can be no doubt that in the light of what is before the court it is not possible to hold that the complaints by the petitioners are baseless or obviously unsustainable. The abuse of process point fails.

I On the facts placed before the court, I am of the view that there should be an independent full and critical investigation of the whole of the affairs of the two companies and of the project. To allow the debenture holder to appoint receivers and managers will have the effect of thwarting

the right of the petitioners to have the company put in the hands of liquidators. The debenture holders should be restrained, until the disposal of the petition or further order, from appointing receivers and managers. As to the project itself and the related contracts, I am inclined to place the whole thing in the hands of provisional liquidators but I would like to hear the parties on that before I make any decision on that.

The following orders are made:

(1) The applications and each of them, to strike out the petitions are dismissed with costs.

(2) The order that had been made earlier restraining the petitioners from prosecuting the petition is set aside.

(3) There will be an order in terms of encl (4) in each petition.

(4) As to encl (50) in Petition No 28–93–94 and encl (42) in Petition No 28–83–94, I would like to hear further submissions. The previously made gagging order restraining the publicity of these petitions and these proceedings is revoked. The petitioners are given leave to advertise and gazette the petitions.

(5) There will be a certificate for two counsel.

(6) The petition will be heard on 21 December 1994.

(7) The petitioners are at liberty to file a new application in respect of the appointment of a provisional liquidator which I direct — if it is to be filed, be filed in good time to be heard with the said encls (50) and (42) which I direct be called for disposal on 15 October 1994 in open court.

Postscript

In respect of Encik Narayanan applying for leave to appeal the orders made, leave is granted. In respect of his application for stay of the orders made pending appeal, it is refused, save that I order a stay of advertising and gazetting the petition until after the disposal of any appeal or application to the Court of Appeal against the refusal to order a stay of the orders made pending appeal and/or the refusal to order a stay of the hearing of the petition, or until further order.

Order accordingly.

Reported by Anne Khoo